No. 82-2140

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

WILBUR HOBBY,

*Petitioner,*

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

## BRIEF FOR THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS *AMICUS CURIAE*

IN SUPPORT OF REVERSAL

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## INTEREST OF AMICUS*/

The NAACP Legal Defense and Educational Func, Inc., has a deep and abiding interest in the standards governing jury

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*/ The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk of Court.

discrimination challenges. Thus, amicus has appeared before this Court in many of the leading cases involving jury issues, both as counsel[1/] and as amicus curiae.[2/] This brief is filed in support of the petitioner.

We urge that the decision of the court below is inconsistent with well-established principles and, if allowed to stand, could lead to serious erosion of the right to have all aspects of jury selection be free of discrimination based on race and sex. The decision of the court below, in holding that the office of grand jury foreperson is too consitutitionally insignificant to re-

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1/ E.g., Patton v. Mississippi, 332 U.S. 463 (1947); Sims v. Georgia, 389 U.S. 404 (1967); Carter v. Jury Commission of Greene County, 396 U.S. 320 (1970); Turner v. Fouche, 396 U.S. 346 (1970); Alexander v. Louisiana, 405 U.S. 625 (1972).

2/ E.g., Peters v. Kiff, 407 U.S. 493 (1972); Davis v. United States, 411 U.S. 233 (1973).

quire reversal of a conviction upon a showing of systematic exclusion of Blacks and women from that office has, in effect, removed all constitutional restrictions on the selection of persons for that position. Such a result finds no support in the case law. Furthermore, the decision below fails to accord proper weight to Congress' intent when it passed the Jury Selection and Service Act of 1968 (28 U.S.C. 1861, et seq.).

## SUMMARY OF ARGUMENT

I

This Court, in the exercise of its supervisory power over the administration of justice in the federal courts, should reaffirm the principle that discrimination on the basis of race or sex has no place in the selection of jurors. The decision of the Fourth Circuit would result on there

being no controls on the selection of grand jury forepersons even in those instances where there has been deliberate discrimination in the process.

II.

The Jury Selection and Service Act guarantees that service on grand juries in the federal system will be free of any type of discrimination. To permit such discrimination in the selection of those who serve as forepersons conflicts with the statute and the intent of Congress.

ARGUMENT

I.

THE COURT SHOULD EXERCISE ITS SUPERVISORY POWER OVER THE ADMINISTRATION OF JUSTICE IN THE FEDERAL COURTS TO REVERSE THE CONVICTION OF PETITIOENR

The issue of systematic exclusion of Blacks from appointment as forepeson of

federal grand juries has been the recent subject of litigation and conflict among the federal circuit courts. The Fourth Circuit, from which this appeal is taken, declined to dismiss the indictment or reverse the conviction of of petitioner on the grounds that there was no deprivation of due process rights by the exclusion of Blacks from the ministerial position of federal jury foreperson. U.S. v. Hobby, 702 F.2d 466, 470 (4th Cir. 1983). Accord, U.S. v. Coletta, 682 F.2d 820, 824 (9th Cir. 1982). (Defendant failed to show that discrimination in appointment of federal grand jury forepersons results in "significant impact on the basic fairness of the process."); U.S. v. Aimone, 715 F.2d 822 (3rd Cir. 1983). These decisions are in direct conflict with two cases in which the Eleventh Circuit found constitutional significance in the office on the ground

the foreperson is endowed "with enhanced persuasive influence" over the other grand jurors. U.S. v. Cross, 708 F.2d 631, 637 (11th Cir. 1983); U.S. v. Perez-Hernadez, 672 F.2d 1380 (11th Cir. 1982).[3/]

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3/ Those circuits declining to attach constitutional significance to the office have done so based on a comparison of the duties of a federal grand jury foreperson outlined in the Fed. R. Crim. P. 6(c) with the duties of a Tennessee grand jury foreperson assumed to be constitutionally significant by the Court in Rose v. Mitchell, 443 U.S. 545 (1979). Fed. R. Crim. P. 6(c) provides that the court shall appoint one juror to be foreman who shall administer oaths, sign indictments, keep a record of the number of jurors concurring, and file the record with the clerk of court.

The Eleventh Circuit has rejected the claim that a federal grand jury is purely ministerial by acknowledging that the foreperson performs other functions than those recited in Fed. R. Crim. P. 6(c). The court took judicial notice of the facts that the federal foreperson decides when to contact the district judge; recieves communications from the U.S. Attorney General's Office; decides when to convene and recess the grand jury; excuses grand jurors on a temporary basis; decides the order in which the witnesses are called; maintains order in the grand jury; helps

Amicus urges that to focus solely on the question of the significance of the office of foreperson,[4] an issue that should be resolved on the merits in favor

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3/ continued

U.S. Attorneys decide whether to initiate contempt proceedings against recalitrant witnesses; and approves grand jury subpeonas often without the consent of the grand jury. The Eleventh Circuit further relied on testimony of federal judges in two Fifth Circuit cases that they chose forepersons based on such criteria as good management skills, strong occupational experience, ability to preside, good educational background, and personal leadership qualities. The Court reasoned that clerical skills would be sufficient qualification for a purely ministerial job. Finally, the Eleventh Circuit recognized that the mere act of appointment by the district judge would render the office significant to the other grand jurors and thus "endow the foreperson with enhanced persuasive influence over his or her peers." Cross, 708 U.S. at 637.

4/ In addition to raising the constitutional significance issue, the Government has raised the possibility of a standing problem for petitioner to assert an equal protection claim. Brief for the United States, pp. 1 at n.4, 17 at n.10. Again,

of petitioner, is to overlook the function of the Court as guardian of the federal court system. Utilizing its "power of supervision over the administration of justice in the federal courts," the Court

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4/ continued

the circuits are at odds with one another on whether a white defendant has standing to complain of the exclusion of Blacks from appointment to federal grand jury foreperson. Compare, U.S. v. Perez-Hernandez, 672 F.2d 1380 (11th Cir. 1982) and U.S. v. Cross, 708 F.2d 631 (11th Cir. 1983), with, U.S. v. Cronn, 717 F.2d 164 (5th Cir. 1983) and U.S. v. Coletta, 682 F.2d 820 (9th Cir. 1982).

In raising its standing objection, the Government relies on Alexander v. Louisiana, 405 U.S. 625 (1972) as well as on the Fifth and Ninth Circuit decisions. Alexander is inapposite to the case at bar because the court in that case denied standing of a male defendant to assert the underrepresentation of women as state grand jurors on the ground that there is no constitutional right to indictment by a grand jury in the state courts. The Fifth Amendment, on the other hand, does guarantee this right to all defendants in the federal courts. In any event, the government concedes that petitioner does have standing to raise a due process claim.

should ensure the eradication of all vestiges of discrimination in the federal judiciary. Ballard v. U.S., 329 U.S. 187, 193 (1946). Discrimination by district court judges in the selection of grand jury forepersons, no less than in the selection of grand jurors, "strikes at the fundamental values of our judicial system and our society as a whole...." Rose v. Mitchell, 443 U.S. 545, 556 (1978).

This Court has consistently recognized that "the scope of [its] reviewing power over convictions brought here from the federal courts is not confined to ascertainment of Constitutional validity." McNabb v. U.S., 318 U.S. 332 (1943).[5/] This reviewing power has been extended repeatedly to check all forms of discrimination

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5/ See also Glasser v. U.S., 315 U.S. 60 (1942).

that creep into the federal judiciary. Arbitrary exclusion of classes from juries "must be counted among those tendencies which undermine and weaken the institution of jury trial." Thiel v. Southern Pacific Co., 328 U.S. 217, 224 (1946).

There is a "strong policy the Court consistently has recognized of combating racial discrimination in the administration of justice." Rose v. Mitchell, supra at 558. This policy has been invoked and expanded under the supervisory power even in the absence of specific Congressional mandates. In Ballard v. U.S., 329 U.S. 187 (1946), the Court reversed the mail fraud conviction of a male defendant on the ground that women had been systematically excluded from grand and petit juries. Although Congress had not at that time prohibited disqualification of federal jurors on account of sex (as it had

for race and party affiliation) the Court concluded that

> the purposeful and systematic exclusion of women from the panel in this case was a departure from the scheme of jury selection which Congress adopted and ... we should exercise our power of supervision over the administration of justice in the federal courts ... to correct an error which permeated this proceeding.

Ballard, 329 U.S. at 193.

The above cases stand for the clear proposition that race and sex discrimination may not be allowed to infect the selection of federal jurors in any respect or at any stage in the process. To condone such discrimination, even if it could be said to relate to a position that was merely symbolic or ministerial,[6/] would be to allow the system of justice to be

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6/ Amicus agrees with petitioner and the Eleventh Circuit that the functions of the foreperson bring the office within the scope of the rule of Rose v. Mitchell.

indelibly stained. The decision of the court below in effect holds that no matter how egregious, direct, and intentional the discrimination might be, it is irrelevant. Such a result, with its injury to the institution of justice in the federal courts, cannot be tolerated.

When the issue presented in this case is thus viewed as an institutional problem, the inquiry as to constitutionally significant injury to petitioner as a result of discriminatory selection of grand jury forepersons in the Eastern District of North Carolina commands less consideration.[7/] The Court has long recognized

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7/ The source of the systemic problem is denial of equal protection for black and female federal grand jurors by the district courts. Although the Court decided Peters v. Kiff, 407 U.S. 493 (1972) on due process grounds, the opinion in that case suggests that additional equal protection grounds are open for white defendants to challenge discrimination in jury selection. In

the danger of allowing discrimination within the judiciary; it "destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process." Rose v. Mitchell, 443 U.S. at 555.

> The injury is not limited to the defendant - there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the process of our courts ... [Thus,] reversible error does not depend on a showing of prejudice in an individual case.

Ballard, 329 U.S. at 195.

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7/ continued

response to respondent's claim that a white defendant must show actual injury to himself as a result of improper jury selection to have standing the Court replied, "that argument takes too narrow a view of the kinds of harm that flow from discrimination in jury selection." Peters, 407 U.S. at 498. In cateloguing the "related constitutional values" offended by exclusion of blacks from jury service, the court included not only the black defendant's right to equal protection, but also "other constitutional values," based on the belief that "the exclusion of Negroes from

II.

THE EFFECT OF THE JURY SERVICE AND SELECTION ACT OF 1968

In 1968 Congress amended Title 28 to strengthen its prohibition of discrimination in the district courts. In passing the Jury Service and Selection Act of 1968 (28 U.S.C. 1861 et seq.) Congress declared that it is the policy of the United States:

> ...that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States ....

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7/ continued

jury service injures not only defendants, but also other members of the excluded class." Peters, 407 U.S. at 499. Thus the case at bar is analogous to Barrows v. Jackson, 346 U.S. 249 (1953), where the Court allowed a white vendor to raise an equal protection defense to a restrictive covenant. "We are faced with a unique situation in which it is the action of the state court which might result in the denial of constitutional rights and in which it would be difficult if not impossible for the persons whose rights are

28 U.S.C. § 1861. Therefore, no one is to be "excluded from service" on account of race or sex. 28 U.S.C. § 1862.

These statutes are strong evidence of congressional intent to prohibit all forms of discrimination in the federal district courts. On their face these statutes do not specifically outlaw discrimination in appointment of grand jury forepersons, but the language, which is directed to "service on grand and petit

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7/ continued

asserted to present their grievance before any court." Barrows, 346 U.S. at 257.

The practice of the district courts put in issue in this case violates the equal protection rights of black and female grand jurors to participate equally in the administration of justice and thus places an unlawful sitgma upon these groups, See Strauder v. West Virginia, 100 U.S. 303 (1880). Unless defendants are allowed to raise these constitutional violations which deny rights to grand jurors and potential forepersons, these rights are likely never to be vindicated.

juries," fairly supports inclusion of service as foreperson within the statutory scheme.[8/]

The legislative history of the Act likewise supports application of the statutory bar on discrimination to all aspects of discrimination within the grand and petit jury systems. Passage of the Act was the direct result of the Fifth Circuit decision in Rabinowitz v. U.S., 366 F.2d 34 (5th Cir. 1966), which focusd attention on jury selection methods used by federal courts. The new system invoked by Congress in 1968 was intended to replace entirely the "key man" system long used in federal courts and broadly criticized in Rabinowitz. One of the central flaws in the key man method of jury selection cited by

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8/ The title of the Act, the "Jury Service and Selection Act" further supports the reading of "service" to encompass more than mere selection to a jury.

the Court was the use of "broad and vague subjective tests" which resultd in disporportionate disqualification of Blacks from jury service. 366 F.2d at 51. The House Report likewise condemned the key man system as susceptible to unconscious discrimination.[9/] Elimination of unconscious as well an intentional discrimination was to be accomplished under the Jury Service and Selection Act by enacting objective and uniform criteria for the selection of juries from sources broadly representative of the community.

The method of selecting grand jury forepersons used in the district courts is disquietingly like the key man system condemned in Rabinowitz. The only difference is that the selecting officials (the "key men") are judges, not jury com-

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9/ H. Rep. 1076. (90th Cong., 2nd Sess., 1968).

missioners. They still use nebulous and non-uniform criteria for selecting foreperson, with the same result of large and statistically significant underrepresentations of both Blacks and women.

In summary, amicus urges the court to recognize the systemic nature of the problem complained of by this Petitioner. Affirming the decision below would put the Court in the unacceptable position of condoning discrimination on account of race and sex by federal judges while prohibiting court clerks, jury commissioners, and state court judges from acting in a similar fashion. The right of all citizens to enjoy equal participation in the administration of justice is a policy deserving of compliance by the federal judiciary.

## CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

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